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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 603.

FIRST IOWA HYDRO-ELECTRIC CO-OPERATIVE,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,
STATE OF IOWA,
Intervenor.

REPLY BRIEF FOR STATE OF IOWA, INTERVENOR, TO BRIEF FOR FEDERAL POWER COMMISSION.

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The State of Iowa received an advance typewritten copy of the brief for the Federal Power Commission after the brief for the State of Iowa was printed and filed herein. The brief for the Federal Power Commission is divided into three divisions. Divisions I and II support the opinion and decision of the United States Court of Appeals for the District of Columbia herein and request that the opinion and decision of the lower Court be affirmed. Division III is a presentation in the alternative, stating that if this Court should decide to pass upon the constitutionality of the Iowa statutes as contained in Chapter 363 of the Iowa Code, then Division

III of the Commission's brief is submitted on that proposition. It attacks the constitutional validity of Section 7771 of the Code of Iowa which is a part of Chapter 363 of the Iowa Code. Because of what is said by counsel for the Commission in Division III of the Commission's brief, the State of Iowa deems it necessary to reply thereto.

A. CONSTITUTIONALITY OF IOWA STATUTES IS NOT PROPERLY BEFORE THIS COURT.

The State of Iowa submits that this Court should not in this case consider or determine the constitutional validity of the Iowa laws, for all of the reasons stated in the brief for the State of Iowa filed herein, and for the affirmative reasons stated in Divisions I and II of the brief filed for the Federal Power Commission.

The rule is as stated by this Court in *Alabama State Federation of Labor* v. *McAdory*, ... U.S. ..... 89 L. Ed. 1270, 1279, which is as follows:

> "When a statute is assailed as unconstitutional we are bound to assume the existence of any state of facts which would sustain the statute in whole or in part. *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U.S. 580, 584, 79 L. Ed. 1070, 1072, 55 S. Ct. 538 and cases cited; *United States* v. *Carolene Products Co.* 304 U.S. 144, 152, 153, 82 L. Ed. 1234, 1241, 1242, 58 S. Ct. 778."

The United States Court of Appeals for the District of Columbia in its opinion herein stated the following:

> "Petitioner's contention—upon the ground of unconstitutionality—depends also upon the assumption that the disputed Iowa Code Sections constitute an absolute bar to its project, hence that their effect is to defeat the jurisdiction of the Federal Government and the purposes of the Power Act. This contention must be rejected, also. It is the duty of Courts to avoid the issue of constitutionality if the statute which is being interpreted is susceptible of any reasonable interpretation consistent

with constitutionality. All parties agree that Iowa's courts have not, so far, been faced with this issue. We see several possible interpretations of the disputed Sections which would avoid the issue. * * * Again it will be noticed that Section 7771 is so phrased as to vest large discretion in the Executive Council. * * * it is entirely within the range of probability that a court would so interpret the first Section (7771) as to allow the issuance of a permit without strict compliance with all of its terms, especially if it were necessary to do so in order to avoid constitutionality." (R. 17, 18.)

We submit that the foregoing quotation from the opinion of the Court of Appeals in the case at bar correctly states the rules of law applicable, and it will be noted that each statement is amply supported by the decisions and opinions by this Court cited in the footnotes. Further, the Court of Appeals in its opinion stated the following:

"* * * it was not the purpose of Congress that the Commission should ride roughshod over any state, whatever the nature of its water laws, or give to a private corporation, licensed by it, the plenary power of eminent domain, unless that corporation had first subjected itself to the state controls which protect the rights, powers, privileges and immunities of its other citizens. Carrying petitioner's argument to its logical conclusion, it would follow that if the Commission could be persuaded to make appropriate findings, a licensee might, by so specifying in its application, take over the State House for its headquarters office or flood the capital city for a storage basin." (R. 66, 67.)

Further, we call attention to the following language in the opinion of the lower Court in this case:

"It may be noted in passing that we are not concerned in this case with a situation in which Congress has elected to exercise the full power delegated by the Constitution. The present case involves no more than the expressly limited powers of a government agency to license a private corporation which seeks to operate under the restrictive provisions of the Power Act. Need-

less to say, no findings or decision of the Commission could enlarge the scope of the Act or increase the Commission's power under it." (R. 70.)

We have set out the foregoing quotations from the opinion in the case at bar to specifically present to this Court the view of the United States Court of Appeals as to the constitutional question and as to the scope of the Federal Power Act, in the exercise of the power of Congress under the commerce clause of the Constitution. We submit that the lower Court was correct in its pronouncements and especially in the light of the record in the case at bar.

We invite the attention of the Court to the existing situation.

Note that it is conceded by petitioner and by the Federal Power Commission that petitioner did not apply to the Executive Council of the State of Iowa for a permit under the provisions of Chapter 363 of the Code of Iowa to construct and maintain the project in question. Note further that the petitioner took the position before the Commission that its proposed project was not subject to the laws of the State of Iowa as contained in Chapter 363 of the Code of Iowa, and that therefore there were no applicable State laws compliance with which is required by the provisions of Chapter 9(b) of the Federal Power Act. Note further that there has been no interpretation or construction of the provisions of the Iowa law as contained in Chapter 363 of the Code of Iowa by either the Iowa Courts or any other Court. The lower Court properly took the position that petitioner cannot complain of the Iowa laws in advance of making an application on the ground that there is danger of refusal. It should apply and see what happens. (R. 55.)

As stated in the quotation from the opinion of the Court of Appeals set out above, the Executive Council of Iowa may interpret the provisions of the Iowa law and may administer

them in such a way as that the laws and the administration of them would be constitutional. If the Executive Council of Iowa should administer the State laws in an unconstitutional manner that is another question. The laws would be constitutional but the administration of them might not be constitutional. Those questions would be determined upon the facts as they arise. The Power Commission correctly ruled that it was for the Courts to determine the validity of the State statutes under the Federal rules. Federal Courts will not undertake to construe or determine the constitutionality of State statutes as an abstract proposition and where there has been no opportunity afforded State Courts to interpret the State statutes.

These rules of construction were very thoroughly considered and ample precedent cited by this Court in the recent case cited above of *Alabama State Federation of Labor* v. *McAdory*, U.S. , 89 L. Ed. 1270, 1277. You there state that this Court is without power to give advisory opinions, and that it has long been the considered practice not to decide abstract hypothetical or contingent questions or to decide any constitutional question in advance of the necessity for its decision.

It is also stated in the last cited opinion that:

> "A law which is constitutional as applied in one manner may, it is true, violate the Constitution when applied in another. (Citing authorities.) But 'Since all contingencies of attempted enforcement cannot be envisioned in advance of those applications' this Court has felt bound to delay passing on 'the constitutionality of all the separate phases of a comprehensive statute until faced with cases involving particular provisions as specifically applied to persons who claim to be injured.'" (89 L. Ed. 1277.)

We call attention to your pronouncement in the recent case of *Asbury Hospital* v. *Cass County, North Dakota*, U.S. , 90 L. Ed. 1, 5, where the following appears:

"We are thus asked to pass on the constitutionality of a possible application of the State statute in advance of its application to appellant, and of its authoritative construction by the State Courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied." (Citing authorities.)

So we submit that this Court under the record in this case is not in a position to pass upon or to determine the constitutional validity of the Iowa statutes, and that that question is not now properly before this Court.

B. CONGRESS HAS NOT ASSUMED ALL OF THE POWERS GRANTED BY THE COMMERCE CLAUSE, IN THE FEDERAL POWER ACT.

Counsel for the Federal Power Commission argue to the effect that the Federal Power Act actually assumes all of the powers of Congress given by the commerce clause of the Constitution. That is not true. The Federal Power Act, while it involves and has for its purpose generally a comprehensive plan, yet is restrictive in nature. Prior to the enactment of the law various interests were securing permits and licenses from the respective States, and approval by the War Department under the Rivers and Harbor Act which were not uniform in nature and not calculated to develop a unified system and plan. Congress expressly had it in mind to unify the procedure not only so that there would be some control over obstructions being placed in the waters over which Congress had jurisdiction but also to give some assurance to interests who secured licenses and rights that they would be protected within the limits prescribed by the Power Act.

It will be noted as pointed out in our original brief, that all of the cases which have come before this Court have involved the question not whether compliance with State laws was required but whether after complying with State laws the parties involved were required to comply also with the Federal Power Act. All that is said in the opinions by this Court and other Courts is relative to the power of Congress to control, regulate and prohibit obstructions in the waters over which Congress has or may exercise control under the commerce clause.

Counsel for the Commission cites *United States* v. *Appalachian Electric and Power Company*, 311 U.S. 377, 85 L. Ed. 253 as sustaining its contention that the Power Commission under the Federal Power Act has all of the powers vested in Congress by the commerce clause of the Constitution. A careful examination of the opinion of this Court in that case does not bear out this contention. True, in the opinion this Court states that Congress has very broad, general and plenary power under the commerce clause of the Constitution but those statements are made in the abstract and not in connection with the limitation expressed in the Federal Power Act itself. In the *Appalachian* case the respondents were challenging the power of Congress to provide in the Federal Power Act the things about which respondent was complaining. Respondent was not complaining that the Federal Power Commission was attempting to exercise powers which were not given the Commission by the law. So what is said in the *Appalachian* case must be considered in that light. And for the purpose of illustrating the point, we call attention to the following quotation from the opinion of this Court in the *Appalachian* case:

> "As respondent soundly argues, the United States cannot by calling a project of its own 'a multiple purpose dam' give to itself additional powers, but equally true the respondent cannot, by seeking to use a navigable water-

way for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public's standpoint a by-product of the general use of the rivers for commerce." (P. 426.)

Also in the *Appalachian* case this Court said:

"The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i.e. to 'prescribe the rule by which commerce is to be governed'. This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; 'that the running water in a great navigable stream is capable of private ownership is inconceivable.'" (Pp. 423, 424.)

We submit that this Court in the *Appalachian* case did not rule that the powers assumed in the Federal Power Act were co-extensive with all of the powers granted by Congress by the commerce clause, but that on the other hand the language indicates clearly that the Federal Power Act did not give to the Commission and did not preempt all of the powers of Congress in this respect.

The Federal Power Act is of limited application because by its provisions the Commission is vested with certain defined duties as contained in Section 4 of the Act. (16 U.S.C. 797.) It will be noted that the Commission does not have any right or power to initiate or authorize the building of dams or projects either in aid of navigation or for water

purposes. It will be noted further that the Commission is authorized to make investigations and to collect data concerning such matters and to report its findings and recommendations to Congress but the Commission itself is not given the power to initiate the construction of any projects. It will be noted in Section 4(e) that the Commission is authorized to issue licenses to those desiring to construct projects that are "necessary or convenient for the development and improvement of navigation and for the development, transmission and utilization of power, etc." Note further in Section 4(e) that it is provided that no license affecting navigable capacity or any navigable waters shall be issued until the plans have been approved by the Chief Engineer and the Secretary of War. The central theme is the protection of navigable capacity. Further it is provided in the following Sections of the law that licenses may be issued on terms and upon conditions, but in Section 9(b) (16 U.S.C. 802) it is specifically provided that each applicant for a license shall submit to the Commission satisfactory evidence that the applicant has complied with the requirements of the laws of the State within which the proposed project is to be located "with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes." Thus it will be observed that the Commission cannot proceed to issue a license until Section 9 and particularly 9(b) has been complied with. As pointed out in our original brief other provisions are also restrictive. It will be remembered that in this case a *private corporation* is seeking a license. No *private licensee* can inherit by virtue of a license issued under the Act all the powers of Congress under the commerce clause. A *private licensee* is in a very different position than the Government if the Government were building the project for governmental purposes under its constitutional authority. We respectfully refer the Court to the Tennessee Valley Authority and to the Denison Reservoir on the Red River

in Texas and Oklahoma projects both of which were authorized by special Acts of Congress. Federal projects can be built only by special Act of Congress not under the provisions of the Federal Power Act. Therefore, we submit that the lower Court correctly stated the rule of law applicable in the following language:

> "It may be noted in passing that we are not concerned in this case with a situation in which Congress has elected to exercise the full power delegated by the Constitution. The present case involves no more than the expressly limited powers of a Government agency to license a private corporation, which seeks to operate under the restrictive provisions of the Power Act." (R. 59.)

The State of Iowa desires to re-emphasize here that in this case it has no quarrel with the Federal Government. Neither does it here contend that the Congress does not have plenary and full power under the commerce clause of the Constitution. The State of Iowa reiterates that there is no conflict and no contest in so far as this case is concerned between the State and the Federal Power Act. No issue has arisen. There was no other course that the Federal Power Commission could follow than to hold that compliance by the petitioner with Section 9(b) of the Act is a prerequisite to the issuance of a license by the Commission to petitioner. Petitioner having failed to comply, the Commission was required under the law to deny the application. The United States Court of Appeals for the District of Columbia correctly stated the applicable principles of law in its opinion affirming the order of the Power Commission. We submit that the lower Court correctly refused to pass upon the constitutionality of the Iowa statutes under the record as it exists in this case, and we submit to this Court that this Court likewise is not in a position to consider or determine the constitutionality of the Iowa statutes, for all of the reasons stated herein.

It is again submitted that the judgment of the United States Court of Appeals for the District of Columbia herein should be affirmed.

Respectfully submitted,

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